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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

MARCUS CAZARES,

PETITIONER

vs.

ELSESSER & RADER, ET AL

RESPONDENTS,

PETITION FOR WRIT OF CERTIORARI

TO THE CALIFORNIA SECOND

APPELLATE DISTRICT

PETITION FOR WRIT OF CERTIORARI

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED

1. DOES THE FAILURE TO GIVE NOTICE OF A PRE-TRIAL MOTION UNDER CALIFORNIA CIVIL CODE OF PROCEDURE § 598 AND 1005 AND CALIFORNIA CONSTITUTION ARTICLE 1 § 7, VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION ?

2. DID THE COURTS INVIDIOUS ACTS IN APPLYING THE PROVISIONS OF CALIFORNIA CIVIL CODE OF PROCEDURE § 581c, 598, 1005, EVIDENCE CODE § 451, 452, 453 AND CIVIL CODE § 1574, CONSTITUTE INTENTIONAL OR PURPOSEFUL DISCRIMINATION OF THE OPERATION OF LAW, WITHIN THE MEANING OF CALIFORNIA CONSTITUTION ARTICLE 4 § 16 AS PROHIBITED BY THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES FOURTEENTH AMENDMENT ?

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NO._____

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

OCTOBER TERM, 1993

MARCUS CAZARES,

Petitioner

vs.

ELSESSER & RADER, ET AL

Respondents

PETITION FOR WRIT OF CERTIORARI

TO THE CALIFORNIA SECOND

APPELLATE DISTRICT

Petitioner, Marcus Cazares, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the California Second District Court of Appeal, denying the right to Notice in violation of

the United States Fourteenth Amendment Due Process Clause. Also, the invidious dismissal of his aciton on a non-suit motion, under Civil Code of Procedure § 581c and 1005 and California Constitution Article 1 § 7, without Equal Protection of the Laws under Evidence code § 451, 452,453 and Civil Code § 1574 and the Decisional Law applicable, in violation of California Constitution Article 4 § 16 and the Fourteenth Amendment.

OPINION BELOW

The opinion of the California Court of Appeal is an unpublished opinion and appears in Appendix "A" to this petition. The summary denial of the Petition for Writ of Review to California Supreme Court appears in Appendix "B" to this petition.

JURISDICTION

The Court of Appeal decision in this matter was filed on November 25, 1992. A timely Petition for Review was filed on 12-31-92.

The California Supreme Court summarily denied the petition on 2-24-93. This Court's Jurisdiction is invoked under Title 28 § 1257 (a). The petitioner argued the issue of Notice to the trial court, the Court of Appeal and Supreme Court. Petitioner, also, argued the Equal Protection clause in his appellate briefs.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment XIV to the United States Constitution is set forth in appendix "C". California Civil Code of Procedure § 581c, 598 and 1005 are set forth in appendix, "D", "E", "F", respectively. Additionally, California Constitution Article 1 § 7 and Article 4 § 16, are set forth as appendix "G" and "H". There are also other various statutes which are listed in the appendices index.

STATEMENT OF THE CASE

On Febuary 6, 1991, this matter came on for trial, after a few continuances, and the pre-trial conference. At the pre-trial conference the court decided to bifucarate two issues before proceeding to the plaintiff's demanded jury trial. Additionally, the court was to decide three motions in limine. The respondents gave petitioner notice of the motions in limine before the trial on 2-6-91. Petitioner, never received notice of the non-suit motions. It was only a few minutes before the trial proceedings were to commence that the respondents served the petitioner with the moving papers. The petitioner complained to the court of lack of notice, appendix, "I". The court refused to allow any additional time for responding. The petitioner then proceeded in the matter without adequate time to prepare an opposition and notice of the motions contents.

After the court addressed the motion in

limine to exclude the petitioners expert witnesses, for failure to comply with Civil Code of Procedure 2034, the motion was granted.

The court then moved to the motions for non-suit based on the Statute of Limitations, Civil Code of Procedure 340.6, which was denied by the court. The second non-suit motion was based on the Failure to Show Professional Standard of Care. The respondents argued that since the petitioner was foreclosed from presenting expert testimony he could not make a prima facie case and the Statutes and Rules of Professional Conduct certainly could not be used to establish any standard of care or breach thereof. The petitioner argued that the Statutes and Rules of Professional Conduct could be Judicially Noticed and used to establish a prima facie case of negligence under the provisions of Civil Code of Procedure § 581c and Evidence code § 451,452,

453. The petitioner also, requested Judicial Notice be taken of the Statutes, Rules, and the Decisional law that were submitted, appendix "J". The petitioners request was denied by the court. In particular the petitioner wanted the court to take Judicial Notice of California Business & Profession code § 6103 and Rule of Professional Conduct 2-111 (a)(2) [now rule 3-700], and rule 6-101. The court granted the motion stating that petitioner needed expert testimony to show legal negligence.

Petitioner, timely filed for a new trial based on the trial irregularities of lack of notice, surprise, that petitioner made a prima facie case of breach of standard of care and that an aciton of fraud does not require any expert testimony and that a prior court ruling established that the question of malpractice was a question of fact, appendix "K", to be determined by the trier of fact and the trier

should have been a jury. The motion for new trial was denied and a timely appeal was taken to the Second Appellate District Court of Appeal and was denied, appendix "A". The appellate actions advanced the arguments of Notice, failure to take Judicial Notice, sufficient evidence to make a prima facie case, and the issue of fraud not requiring any expert testimony and the application of the State and Federal Constitutional Clauses of Due Process (NOTICE) and Equal Protection of the laws. All State Appellate relief being denied, this Court is requested to decide whether or not the actions complained of violated the Fourteenth Amendment Clauses of Due Process and Equal Protection of the laws.

REASONS FOR GRANTING THE WRIT

STATE AND FEDERAL CONSTITUTION REQUIRE THAT ADEQUATE NOTICE BE GIVEN. FAILURE TO PROVIDE NOTICE IS DENIAL OF DUE PROCESS AND EQUAL PROTECTION OF THE LAW.

At the commencement of the proceedings on 2-6-91, the petitioner argued that he had just been served with the non-suit motions to be heard, appendix "I". The trial court refused the petitioner additional time to prepare adequate response. Compliance with the U.S. fourteenth Amendment would be "timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own argument and evidence orally." Goldberg v. Kelly (70) 397 U.S. 254, 90 S.Ct 1011, 25 L.Ed 2d 287.

Since the trial court was to determine the issue of liability before allowing the matter to be presented to a jury, or an open-

ing statement, a fair administration of the law would have been to allow the petitioner a response. Failure to do so deprived petitioner the exercising of his right to jury trial, California Constitution Article 1 § 16. As this Court has stated effective Notice would require that;

> "The notice must be the best practicable, reasonably calculated, under all the circumstances, to appraise interested parties of the pendency of the action and afford them an opportunity to present objections. "Mullane,339 U.S. at 314-315; cf Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 174-175 (1974). "The notice should describe the aciton and the plaintiffs rights in it." Phillips Petroleum Co. v. Shutts (85) 472 U.S. 797, 812.

The bifucaration of issues is authorized under California Civil Code of Procedure § 598, appendix "E". The procedure of notice

on a motion is stated in Civil Code of Procedure § 1005, appendix "F". The requirement is fifteen days notice (if service is personal) or 20 days (if by mail). The failure in this instance was equivalent to depriving the petitioner of his Constitutional right to Due Process.

The Equal Protection Clause of the Fourteenth amendment was also, violated because the action was against California Constitution Article 4 § 16, this particular section provides:

" All laws of General nature have uniform operation."

The Equal Protection Clause will not be invoked unless, " the unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denying of equal protection unless there is shown to be present in it an element of intentional or pur-

poseful discrimination." Snowden v. Hughes (43) 321 U.S. 1,8; Coulter v. Louisville & Nashville R. Co. (1905) 196 U.S. 599, 607, 609-610; Allegheny Pittsburgh Coal v. Webster County (88) ~~488~~ U.S. 336, 343. In this case before the Court, the petitioner was intentionally and purposefully discriminated against because his adversary is in the employment of State Senator David Roberti. This Court has stated that extraneous factors may be considered to determine this issue.

> " It may only be shown by extrinsic evidence showing a discriminatory design to favor one individual or class over another not to be inferred from the action itself." Yick Wo v. Hopkins (1866) 118 U.S. 356, 373-374.

If the respondent had been someone other than one of political clout, the meaning of the statute, requiring notice, would have been followed.

The Equal Protection Clause of the Fourteenth Amendment is not satisfied, where as, in this case the advantage is given favorably to one party over another, against the policy of the Constitutional and Decisional Law of the land.

The petitioner is not asking for an advantage in this matter because his adversary may have a powerful association. Rather petitioner only asks to be treated the same under the Laws of the State of California and the United States.

THE PETITIONER WAS NOT TREATED EQUALLY IN THE APPLICATION AND OPERATION OF THE LAWS OF CALIFORNIA, AS WAS HIS ADVERSRY, IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES FOURTEENTH AMENDMENT.

On 2-6-91, this case was assigned to a trial court for commencement. The court addressed a motion in limine to Exclude any

expert witnesses the petitioner, may wish to introduce. The motion was decided against the petitioner and the court moved to the bifucarated issues based on the Statute of Limitations and the motion for non-suit for Failure To Show a Breach of Professional Standard of Care. The court denied the motion based on the Statute of Limitations. The second motion for non-suit was commenced. Both motions were heard over the petitioners objections of lack of notice.

The court allowed the respondents request for Judicial Notice. These requests were of issues adjudicated in the underlying case and in the Malpractice.

The petitioner also, requested, Judicial Notice of several pleadings, statutes, a court ruling in the Malpractice csse, and Decisional Law, appendix "J". The court refused the petitioners requests. In California the Statutory provisions of Evidence Code § 451, is mandatory and § 453, make a perm-

issive Notice mandatory upon notice of the items requested, appendix, "L", In Re Culver (1921) 187 C. 437, 440, at hd nt. 3.

The petitioner was intentionally and purposefully discriminated in the application and operation of the statutory provisions of evidence code § 451 and § 453, appendix "L", in violation of the United States Fourteenth Amendment Equal Protection Clause. Had the court taken Judicial Notice as it was mandated, the petitioner would have made a prima facie case upon the record, thus entitling him to a jury trial on the facts.

The particular items requested by petitioner were Rule of Professional Conduct 2-111 (a)(2), 6-101 and Business and Profession Code § 6103, and an earlier finding of the court that the issue of Malpractice was a question of fact for the trier of fact, appended here respectively as "M", "N", "O", "K". This proof would have been sufficient to make a prima facie case to

survive a motion for non-suit, O'Keefe v. South End Rowing Club,(66) 64 C.2d 729, 733, 746.

> " A nonsuit may be granted after the plaintiff's presentation of evidence only when no evidence of sufficient substantiality exist to support the verdict for plaintiff." Carson v. Facilities Development Co. (84) 36 C.3d 830, 838.

In this type of motion all evidence which is favorable to the plaitniff must be accepted as true and conflicting evidence must be disregarded.

In California the standard for determining duty and breach for an attorney has been guided by the rules of professional conduct.

> "The standards governing an attorney's ethical duties are conclusively established by the Rules of Professional Conduct. They cannot be changed by

expert testimony. If an expert testifies contrary to the Rules of Professional Conduct the standards established by the rules govern and the expert testimony is disregarded." Kirsch v. Duryea (79) 21 C.3d 393, 411; Day v. Rosenthal (85) 170 Cal.App. 1125, 1147.

The respondents had agreed to perform duties outlined in the underlying case, status conference report. These duties were to amend the complaint, subpena specified witnesses and on reliance upon these representations the petitioner contracted with the respondents. Petitioner also, relied on the respondents representations that they were experts. The provisions of Civil Code § 1574, appendix "P", state, "Actual fraud is always a question of fact." Seeger v. Odell (41) 18 C.2d 409, 414-415, Guido v. Koopman (91) 1 Cal.App. 4th 837, 843. At a minimum this cause of action

should be allowed before the jury.

The respondents were bound by a court ordered discovery cut-off date, while they were counsel of record. During this same time the cut-off date expired. Thereafter, they moved to withdraw, without informing the petitioner that no further discovery would be allowed. Thereafter, the petitioner was foreclosed from obtaining evidence to support his claim of a timely EEOC filing.

The denial of petitioners requests for Judicial Notice, dismissing his case for lack of sufficient evidence, denial of jury trial on the fraud issue and the negligence issue were against the Statutory, Constitutional and Decisional Law of the State of California and the United States Fourteenth Equal Protection Clause. These invidious acts combined and separately were intentional and purposefull discrimination.

" Determining whether invidious discrimination purpose was a motivating

factor demands a sensitive inquiry into such circumstances and direct evidence of intent as may be available." Arlington Heights v. Metropolitan Housing Corp. (77) 429 U.S. 252, 265, at 266.

There was no valid reason to depart from the statutory provisions and the decisional law, under the provisions of California Constitution Article 4 § 16 and the United States Fourteenth Amendment.

CONCLUSION

The petitioner has shown that the proceedings below were preliminary to him exercising his right to jury trial. These type of hearings require some notice of the action proposed and a detail of the intended results requested. The appellate court completely side stepped this issue in the unpublished opinion. Taking a party by surprise to gain an unfair advantage cannot

be construed to be fair play under the Fourteenth Amendment Due Process Clause.

The petitioner has also shown that under the provisions of Evidence Code § 451, 452,453 Judicial Notice of Statutes, Rules of Professional Conduct, Constitutional and Decisional Law are compulsory. The petitioner has further demonstrated that under Civil Code of procedure 581c, he only needs to make a prima facie case to be entitled to his jury trial on the negligence issue. Regarding the issue of fraud petitioner has shown that this type of fraudulent action is no more acrane to an attorney than it is to any one else. For this reason no expert testimony is required. On the issue of neglegence, no expert is necessary to determine whether or not the attorney missed the discovery deadline.

The courts refusal to take mandatory Judicial Notice and refusing to comply with the standards to determine if a prima facie case had been made and if expert testimony was required for the negligence and fraud issue were an abuse of the Judicial Process and established a pattern of discrimination. This discrimination was the result of a certain clout the respondents had and was wrongfully used to determine the outcome of the matter.

These actions are invidious violations of the Fourteenth Amendments Equal Protection Clause.

Dated: May 21, 1993

Respectfully Submitted,

/s/ Marcus Cazares

MARCUS CAZARES

PETITIONER IN PRO PER

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF

THE STATE OF CALIFORNIA

MARCUS CAZARES,	No. B057709
Plaintiff and Apellant,	(Super.Ct.No. WEC103902)
v.	
CHARLES F. ELSESSER JR.,etal	
Defendant and Respondent	

Marcus Cazares appeals from the judgment entered in favor of respondents Charles F. Elsesser & Rader (referred to collectively as the "Law Firm"), in Cazares's action for legal malpractice He contends:

"[I.] [Cazares] demanded and posted jury fees and was entitled to a jury trial. [II.] In a jury trial a motion for nonsuit cannot be heard until the jury is empaneled and either an opening statement or presentation of evidence is made. [III.] The evidence presented at the proceedings of 02-06-91 were sufficient to defeat the motion for nonsuit."

The Law Firm filed a defensive cross-appeal. It contends Cazares's action against it is barred by the statute of limitations.

In July 1974, Cazares was employed by Rockwell International Company ("Rockwell") as a cost analysis accountant. He was transferred to cost scheduling in May 1975, which displeased him. In June 1975, Cazares learned from a co-employee that a white female employee had been hired to fill the vacancy caused by his transfer. He submitted an internal employment discrimination complaint to Rockwell, in which he complained about his transfer and work assignment. He alleged that he mailed a copy of this complaint to the Equal Employment Opportunity Commission ("EEOC") in June 1975, as well.

Cazares was laid off during a general work force reduction in February 1976. In July 1976, the EEOC received Cazares's internal employment discrimination complaint. Cazares filed a Title VII action in federal court

against Rockwell in December 1983, alleging job discrimination occurring in 1975. He filed the action in pro per.

In April 1984, the Law Firm became counsel of record for Cazares in the federal action. The Law Firm defended Cazares in deposition, opposed a summary judgment motion, initiated discovery against Rockwell, and responded to discovery demands. The Law Firm requested permission in September 1984 to either settle the case or withdraw as counsel of record, after discovering evidence which convinced it that Rockwell had not discriminated against Cazares. He refused the Law Firm's requests, and, in October 1984, the District Court permitted the Law Firm to withdraw as attorney of record.

On March 15, 1985, Rockwell prevailed after an evidentiary hearing on the bifurcated issue of whether Cazares had timely filed his EEOC charge. Cazares was barred from continuing the Title VII action.

Cazares appealed the determination in pro per and, ultimately, his petition for certiorari was denied by the United States Supreme Court.

Cazares filed the present action for attorney malpractice in 1986. The Law Firm twice moved for summary judgment, and, although the motions were denied, numerous factual issues were found for the defense.

When the trial date was set, in 1990, the Law Firm demanded mutual disclosure of expert witnesses (Code Civ. Proc. § 2034). Cazares responded that he did not intend to call any expert witnesses at trial.

The case was called for trial in February 1991. The Law Firm successfully moved in limine to preclude expert testimony by Cazares at trial. The Law Firm's first motion for nonsuit, on statute of limitations grounds, was denied. The second, that plaintiff was unable to prove a prima facie case without expert testimony, was granted. These appeals followed.

Cazares's first contention lacks merit. Nonsuit is by statute available in a jury trial. (Code Civ.Proc., § 581c.) It concedes the truth of the facts to be presented, but denies that they, as a matter of law, sustain the plaintiff's case. (John Norton Farms, Inc. v. Todagco (1981) 124 Cal.App.3d 149, 160-161.) Contrary to Cazares's position, the trial court did not usurp the role of fact-finder, but rather determined a legal issue: whether Cazares could prove negligence absent expert evidence.

Cazares's second contention also lacks merit. Section 581c of the Code of Civil Procedure states in relevant part: "After the plaintiff has completed his or her opening statement, or the presentation of his or her evidence in a trial by jury, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a judgment of nonsuit." The Law Firm's motion for nonsuit was granted prior

to opening statements, based upon its in limine motion to exclude expert evidence on the ground that Cazares had failed to comply with section 2034 of the Code of Civil Procedure.

At the outset, the trial court asked the parties how they wished to proceed on the motion. Both sides immediately urged the merits of the motion, and Cazares was given full opportunity to describe the ultimate facts he was prepared to prove. He did not request an opportunity to make an opening statement. Upon appeal, moreover, Cazares has failed to show how the lack of opening statement, which would have entailed considerable public expense in empaneling a jury, prejudiced him. He instead asserts at page 14 of his opening brief that he should have been allowed to present evidence. As discussed below, the motion was properly granted, and Cazares was therefore not entitled to present evidence to the jury.

Cazares's last contention is unavailing. Expert evidence is necessary to prove the standard of care applicable to an attorney except where the failure of the attorney's performance is clearly contrary to established standards (see Wilkinson v. Rives (1981) 116 Cal.App.3d 641 647-648), for example, where there are "numerous, blatant and egregious violations" of ethical duties. (Day v. Rosenthal (1985) 170 Cal.App.3d 1125, 1146-1147.) Cazares failed to show that the present case fits within the exception.

Cazares urged the court that the Law Firm's negligence lay in not, prior to a discovery cut off date, "subpoena(ing) Mr. Olmos from the EEOC and also the director of Affirmative action of Rockwell International at the time of my employment who could have addressed the issues of the timeliness and could have also addressed the issues of the

fraudulent activities at Rockwell at the time of which he has personal knowledge and that --all those circumstances could have and I believe would have entered into the court's decision in claim for continuing discrimination and..retaliation and also on a fraud basis." The Law Firm pointed out that they had engaged in discovery during the five-month period they represented Cazares.

The issues of whether the additional witnesses could have provided evidence of substance to Cazares's cause and whether the Law Firm breached its duty by failing to depose them are not within the common knowledge of lay person's. Cazares submitted a declaration by Olmos which did not address Cazares's case in particular, but rather stated EEOC policy recognizing the appropriate cases where EEOC charges were filed late; "For example, the EEOC would apply equitable tolling in a situation involving ignorance of statutory rights caused by improper conduct

of the employer or where the employee filed the charge with the wrong agency. ¶ ...An example of equitable estoppel would involve a situation where the employee is precluded from exercising his/her statutory rights resulting from representations made by the employer."

Cazares stated in his trial brief that Rockwell's affirmative action officer Ramon Sena "could have testified as to the discrimination of Rockwell and that Rockwell impeded his work as Affirmative Action Administrator. Also, that Rockwell[']s fraudulent, mischarging was taking place during the time of the plaintiff[']s employment."

The advisability of deposing either Olmos or Sena is not immediately apparent, and would depend no doubt upon litigation strategy. At the time of the Law Firm's representation, Cazares took the position that he had personally mailed his charge to

the EEOC within the 300 day time limit, in June 1975. The district court, subsequent to the Law Firm's withdrawal, found Cazares's testimony on this point to be not credible, and dismissed the action. Whether testimony regarding equitable estoppel and tolling should have appeared relevant prior to the district court ruling is questionable. Under the circumstances, Cazares was required to establish the professional standard of care through expert testimony.

The judgment is affirmed.

NOT FOR PUBLICATION

_____, Acting P.J.
GATES

We connur:

_____,J.
FUKUTO

_____,J *
LORD

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* Assigned by the Chairperson of the Judicial Council.

SUPREME COURT
FILED
FEB 24 1993
Robert Wandruff Clerk

Deputy

Second Appellate District,

Division Two, No. B057709

S030509

IN THE SUPREME COURT OF

THE STATE OF CALIFORNIA

IN BANK

MARCUS CAZARES, Appellant,

v.

CHARLES F. ELSESSER, Jr., Respondent

Appellant's petition for review DENIED.

LUCAS
Chief Justice

AMENDMENT XIV-CITIZENSHIP;PRIVILEGES AND IMMUNITIES;DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any peron of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CALIFORNIA CODE OF CIVIL PROCEDURE

§ 581c. After Plaintiff Completes Opening Statement or Presents Evidence Defendant May Move for Nonsuit-Determination.

(a) After the plaintiff has completed his or her opening statement, or the presentation of his or her evidence in a trial by jury, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a judgment of nonsuit.

(b) If it appears that the evidence presented or to be presented, supports the granting of the motion as to some but not all of the issues involved in the action, the court shall grant the motion as to those issues and the action shall proceed as to the issues remaining. Despite the granting of the motion, no final judgment shall be entered prior to the termination of the action, but the final judgment in the action shall, in addition to any matters determined in the

trial, award judgment as determined by the motion herein provided for.

(c) If the motion is granted, unless the court in its order for judgment otherwise specifies, the judgment of nonsuit operates as an adjudication upon the merits.

(d) In actions which arise out of an injury to the person or property, when a motion for judgment of nonsuit was granted on the basis that the defendant was without fault, no other defendant during trial over plaintiff's objection, may attempt to attribute fault to or comment on the absence or involvement of the defendant who was granted the motion.

CALIFORNIA CODE OF CIVIL PROCEDURE

§ 598.Precedence in Order of Trial of Issues

The court may, when the convenience of witnesses, the ends of justice, or the economy and efficiency of handling the litigation would be promoted thereby, on motion

of a party, after notice and hearing, make an order, no later than the close of pre-trial conference in cases in which such pretrial conference is to be held, or, in other cases in which such pretrial conference is to be held, or, in other cases, no later than 30 days before the trial date, that the trial of any issue or any part thereof shall precede the trial of any other issue or any part thereof shall precede the trial of any other issue or any part thereof in the case, except for special defenses which may be tried first pursuant to sections 597 and 597.5. The Court, on its own motion, may make such an order at any time. Where trial of the issue of liability as to all causes of action precedes the trial of other issues or parts thereof, and the decision of the court, or the verdict of the jury upon such issue so tried is in favor of any party on whom liability is sought to be imposed.

judgment in favor of such party shall thereupon be entered and no trial of other issues in the action as against such part shall be had unless such judgment shall be reversed on appeal or otherwise set aside or vacated.

If the decision of the court, or the verdict of the jury upon the issue of liability so tried shall be against any party on whom liability is sought to be imposed, or if the decision of the court or the verdict of the jury upon any other issue or part thereof so tried does not result in a judgment being entered pursuant to this chapter, then the trial of the other issues or parts thereof shall thereafter be had at such time, and if a jury trial, before the same or another jury, as ordered by the court either upon its own motion or upon the motion of any party, and judgment shall be entered in the same manner and with the same effect as

if all the issues in the case had been tried at one time.

CALIFORNIA CODE OF CIVIL PROCEDURE

§ 1005-Written Notice for motion;service and filing of moving and supporting papers.

(b) Unless otherwise ordered or specifically provided by law, all moving and supporting papers shall be served and filed at least 15 calendar days before the time appointed for the hearing. However, if the notice is served by mail the required 15-day period of notice before the time appionted for the hearing shall be increased by five days if the place of mailing and the place of address are within the State of California,...

CALIFORNIA CONSTITUTION ARTICLE 1 § 7

Due Process and equal protection;

sec. 7 (a) A person may not be deprived of life,liberty,or property without due process of law or denied equal protection of the laws...

CALIFORNIA CONSTITUTION ARTICLE 4 § 16

Uniform operation of laws;local or special laws

Sec.16 (a) All laws of a general nature have uniform operation. (b) A local or special statute is invalid in any case if a general statute can be made applicable.

COURT OF APPEAL OF THE

STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

MARCUS CAZARES PLAINTIFF AND APPELLANT, VS. ELSESSER & RADER,ET AL, DEFENDANTS AND CROSS-APPELLANTS	SUPERIOR COURT NO. WEC 103902

APPEAL FROM THE SUPERIOR

COURT OF LOS ANGELES COUNTY

HONORABLE HIROSHI FUJISAKI

JUDGE PRESIDING

REPORTERS' TRANSCRIPT OF APPEAL

APPEARANCES:

FOR PLAINTIFF-APPELLANT:	MARCUS CAZARES IN PROPRIA PERSONA 2115½ LAVERNA AVE EAGLE ROCK, CA. 90041 213-257-4815
FOR DEFENDANTS CROSS-APPELLANTS ELSESSER & RADER CHARLES F. ELSESSER, JR., ESQ. AND ALLAN RADER, ESQ.	A. K. STILLMAN BAKER, SILBERBERG & 2850 OCEAN PARK BLVD SUITE 300 SANTA MONICA, CA. 90405 213-399-0900

VOLUME 1 OF 1 J.DOLORES MRAZ, CSR NO. 1930

PAGES 1 - 38, INCL. OFFICIAL REPORTER

MR. CAZARES: ALSO THE DEFENDANTS HAVE MADE A MOTION, SEPARATE MOTION, FOR NONSUIT REGARDING THAT, SO I HAVEN'T HAD AN OPPORTUNITY TO ADDRESS IT. I RECEIVED IT TODAY. SO I AM NOT FAMILIAR WITH THAT NEW CASE THAT SHE REFERRED TO, TROCHE.

AND I WOULD ALSO LIKE TO ASK THE COURT FOR SOME TIME TO RESPOND TO IT.

THE COURT: NO. WE ARE HERE FOR TRIAL.

MR. CAZARES: YOUR HONOR, COULD I ASK YOU TO TAKE JUDICIAL NOTICE OF THE EXHIBITS THAT I SUBMITTED TO THE CLERK IN CONSIDERATON?

THE COURT: YOU WANT ME TO TAKE JUDICIAL NOTICE OF

THIS? I AM NOT GOING TO TAKE--

MR. CAZARES: FOR THE DEFENDANTS. ONE OTHER ONE IS MY EXHIBIT DOUBLE R, WHICH IS MY NATALI CASE. HAVE TO BACKTRACK A LITTLE BIT AT EXHIBIT---

THE COURT: I AM NOT GOING TO TAKE JUDICIAL NOTICE OF IT. YOU MAY CITE IT.

MR. CAZARES: AND THEN EXHIBIT Q, WHICH IS THE WELCH VERSUS ERSKINE CASE.

THE COURT: EXHIBIT Q IS NOT THE WELCH VERSUS--

MR. CAZARES: I AM SORRY. DOUBLE Q. DOUBLE Q. IF YOU PULL THE TAB THAT IS MARKED DOUBLE Q, IT WILL APPEAR AS DOUBLE Q.

THE COURT: WELL, YOU ARE JUST CITING

THIS CASE,

28 AREN"T YOU? I AM NOT GOING TO TAKE JUDICIAL NOTICE OF IT.

1 YOU MAY CITE IT.

2 MR. CAZARES: WELL, UNDER MAGNOLIA VERSUS SAFECO I"D

3 LIKE TO ASK THAT IF YOU DO TAKE JUDICIAL NOTICE OF IT.

4 THE COURT: FOR WHAT? YOU DON'T TAKE JUDICIAL NOTICE

5 OF CASES CITED FOR AUTHORITY.

6 MR. CAZARES: WELL, IT IS A JUDGMENT.

7 THE COURT: I AM NOT GOING TO TAKE JUDICIAL NOTICE OF

8 THAT. YOU CAN CITE IT AS AUTHORITY, BUT I AM NOT GOING TO

9 TAKE JUDICIAL NOTICE OF IT.

10 MR. CAZARES: ALL RIGHT. TWO THAT ARE NOT CASES--

11 AND THAT IS PART OF THE FEDERAL DIST-RICT CASE WHICH WAS THE

EXHIBIT--EXHIBIT TRIPLE B IS ANOTHER ONE IN THE —
UNDERLYING CASE WHERE THE DEFENDANTS OPPOSED ANY DISCOVERY
BECAUSE THAT SHOULD HAVE ALREADY BEEN DONE BY THE
DEFENDANTS PRIOR --
MS. STILLMAN: TRIPLE B? CAN I SEE A COPY OF THAT?
THE COURT: OPPOSITION TO PLAINTIFF'S REQUEST TO TAKE
DEPOSITION AFTER DISCOVERY CUTOFF. THIS IS IN THE
UNDERLYING CASE.
CAZARES: THAT'S CORRECT.
MS. STILLMAN: THERE ARE NO COURT ORDERS ATTACHED.
THAT IS MERELY A PLEADING.
MR. CAZARES: WELL, JUST TO --
THE COURT: I WILL DECLINE TO TAKE JUDICIAL NOTICE OF
THAT.

26 MR. CAZARES: THE OTHER ONE IS OF THE SAME

27 CHARACTER. SO--

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF LOS ANGELES DEPT

12-15-88 WE G

Honorable Judge Deputy Clerk

IRVING A SHIMER B SMITHSON

HONORABLE JUDGE PRO TEM

NONE Deputy sherrif NONE Reporter

(Parties and counsel checked if present)

WEC 103902 Counsel for

CAZARES, MARCUS Plaintiff

Sherman Weber

ELSESSER & RADER- Counsel for

ETC- ET AL Defendant

K T Dúnbar

Kathleen M. Roche

NATURE OF PROCEEDINGS

DEFTS (ELSESSER & RADAR) MOTION FOR SUMMARY JUDGMENT OR, FOR SUMMARY ADJ OF ISSUES: C/F NOV 23, 1988 I-c	DENY SUMMARY JUDGMENT WHETHER THERE WAS MALPRACTICE IS A QUESTION OF FACT NOT OVERCOME IN THIS MOTION. THE STATUTE OF LIMITATIONS CERTAINTLY DID NOT BAR THE CLAIM PER ROBINSON V. MCGINN (1987) 195 CA3d 66.

GRANT SUMMARY ADJUDICATION AS TO ISSUES a,c,d,e.

DENY SUMMARY ADJUDICATION AS TO ISSUES b, f, g, h, i.

ATTORNEY ORDER.

__It is stipulated that commissioner___ may hear this matter as Judge Pro Tem.

__TRANSFERRED TO/FROM DEPARTMENT___

___Court Disqualifies itself

___ 170.6 CCP affidavit filed

__OFF CALENDAR __ON COURT OWN MOTION

__NO APPEARANCES __ AT REQUEST OF MOVING PARTY

__BY STIPULATION

__CONTINUED TO____IN DEPT_AT__AM/PM

__On court's own motion __Stip to be filed

__On oral/written stipulation

__OSC Discharged

__REQUEST OF __Moving Party

__Respondent

___Per Exparte order of_____

__TRO to remain in full force and effect

__TRO dissolved

__MOTION __granted as prayed__denied

__argued and taken under submission

___DEMURRER__sustained__overruled

___with/without leave to amend

___day to amend/answer

___JUDGMENT_X_ORDER TO BE PREPARED BY:

_X_ Moving Party __Responding Party__

__Clerk

_X_ NOTICE _X_ Waived

___By moving party __by responding party

___PETITIONER(S)_IS/ARE SWORN AND TESTIFIES /TESTIFY

___PETITION IS GRANTED (AS AMENDED)

___ DECREE IS SIGNED AND FILED

MINUTES ENTERED

WE G 12-15-88

dept COUNTY CLERK

CALIFORNIA EVIDENCE CODE

§ 451. Mandatory Judicial Notice.

Jucicial Notice shall be taken of the following. (a) The decisional, constitutional, and public statutory law of this State and the United States and the provisions of any charter described in Section 3, 4, 5, of Article XI of the California Constitution. (c) Rules of Professional conduct for members of the bar adopted pursuant to Section 6076 of the Business and Professions Code and the rules of practice and procedure for the courts of this state ad-

opted by the Judicial Council.

(e) The true signification of all English words and phrases and of all legal expressions.

(f) Facts and propositions of generalized knowledge that are so universally known that they cannot reasonably be the subject of dispute.

§ 452. Permissive Judicial Notice.

Judicial notice may be taken of the following matters to the extent that they are not embraced within Section 451:

(a) The decisional,constitutional, and statutory law of any state of the United States and the resolutions and private acts of the Congress of the United States and of the Legislature of this state.

(b) Regulations and legislative enactments issued by or under the authority of the United States or any public entity in the United States.

(c) Official acts of the legislative, executive and judicial departments of the United States and of any state of the United States.

(d) Records of (1) any court of this state or (2) any court of record of the United States or of any state of the United States.

(e) Rules of court of (1) any court of this state or (2) any court of record of the United States or of any state of the United States.

(f) The law of an organization of nations and of foreign nations and public entities in foreign nations.

(g) Facts and propositions that are of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute.

(h) Facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by

resort to sources of reasonably undisputable accuracy.

§ 453. Permissive Notice Conditionally Mandatory Upon Request.

The trial court shall take judicial notice of any matter specified in Sections 452 if a party requests it and:

(a) Gives each adverse party sufficient notice of the request, through the pleadings or otherwise, to enable such adverse party to prepare to meet the request; and

(b) Furnishes the court with sufficient information to enable it to take judicial notice of the matter.

CALIFORNIA RULE OF PROFESSIONAL CONDUCT

RPC 2-111 (A) In General.

(2) In any event, a member of the State Bar shall not withdraw from employment until he has taken reasonable steps to avoid forseeable prejudice to the rights of his client, including giving due notice to his client,

allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules.

RPC 6-101 Failing to Act Competently

(A) (1) Attorney competence means the application of sufficient learning, skill, and diligence necessary to discharge the member's duties arising from the employment or representation.

(2) A member of the State Bar shall not intentionally or with reckless disregard or repeatedly fail to perform legal services competently.

(B) Unless the member associates or, where appropriate, professionally consults another lawyer who the member reasonably believes is competent, a member of the State Bar shall not

(1) Accept employment or continue representation in a legal matter when the

member knows that the member does not have, or will not acquire before performance is required, sufficient time, resources and ability to, perform the matter with competence, or

(2) Repeatedly accept employment or continue representation in legal matters when the member reasonably should know that the member does not have, or will acquire before performance is required, sufficient time, resources and ability is, perform the matter with competence.

(C) As used in this rule, the term "ability" means a quality or state of having sufficient learning and skill and being mentally, emotionally and physically able to perform legal services.

A member of the State Bar shall not willfully and habitually

(1) Perform legal services for a client or clients if he knows or reason-

ably should know that he does not possess the learning and skill ordinarily possessed by lawyers in good standing who perform, but do not specialize in, similar services practicing in the same or similar locality and under similar circumstances unless he associates or, where appropriate, professionally consults another lawyer who he reasonably believes does posses the requisite learning and skill;

(2) Fail to use reasonable diligence and his best judgment in the exercise of his skill and in the application of his learning in an effort to accomplish, with reasonable speed, the purpose for which he is employed.

The good faith of an attorney is a matter to be considered in determining whether acts done through ignorance or mistake warrant imposition of discipline under Rule 6-101.

CALIFORNIA BUSINESS AND PROFESSION CODE

§ 6103 Disobedience of court order; violation of oath or attorney's duties

A willful disobedience or violation of an order of the court requiring him to do or forebear an act connected with or in the course of his profession, which he ought in good faith to do or forbear, and any violatin of the oath taken by him, or of his duties as such attorney, constitute causes for disbarment or suspension.

CALIFORNIA CIVIL CODE

§ 1574 Question of Fact

Actual fraud is always a question of fact.

Law Offices

ELSESSER AND RADER

First Interstate Bank Building

707 Wilshire Boulevard Suite 400

LOS ANGELES, CALIFORNIA 90017

(213) 627-9990

February 16, 1984

Mr. Mark Cazares
2117 Laverna Ave.
Los Angeles, CA. 90041

Re: Cazares v. Rockwell

Dear Mr. Cazares:

Several weeks ago I spoke with you concerning the possibility of our firm performing some legal work for you with respect to the above mentioned case. Since that time I have not heard from you. I just wanted to let you know that we continue to be willing to perform that work should you desire to engage us.

I look forward to hearing from you.

Sincerely,

CFE/c CHARLES F. ELSESSER JR.

JOSEPH J. McCANN, JR.

DAVID J. SHAPIRO

ROCKWELL INTERNATIONAL CORPORATION

2230 East Imperial Highway

E1 Segundo, California, 90245

231- 647-5103

STEPHEN E. TALLENT

KENNETH D. HOFFMAN

KAREN L. KAHN

GIBSON, DUNN & CRUTHCHER

333 SOUTH GRAND AVENUE

LOS ANGELES, CALIFORNIA 90071

(213) 229-7000

ATTORNEYS FOR DEFENDANT

ROCKWELL INTERNATIONAL CORPORATION

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MARCUS CAZARES,	)	Civil No.
	)	
Plaintiff,	)	CV 82-6751 MRP(Kx)
	)	
v.	)	ORDER
	)	

ROCKWELL)
)
INTERNATIONAL)
)
CORPORATION,)
)
Defendant,)
)

All discovery must be completed by June 29, 1984. The pre-trial conference is hereby scheduled for August 27,1984, 01:30 p.m.

So ordered.

Dated: April 12, 1984

Judge Marianna R. Pfaelzer
United States District Court
Central District of California

Attorney or Party with out attorney (Name Address and Telephone No.)

Sherman S. Weber

(213) 670-5931

7407 Agnew Ave

Los Angeles, California

90045

Attorney for (Name)

Plaintiff

For Court Use

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF LOS ANGELES

Plaintiff(s)/Petitioner(s)

MARCUS CAZARES

Defendant(s)/Respondent(s)

ELSESSER & RADER et al

AT-ISSUE MEMORANDUM (Rule 209)

__COUNTER __AMENDED

CASE NUMBER

WEC 103902

1. BREACH OF WRITTEN CONTRACT, FRAUD & MISREPRESENTATION & MALPRACTICE.

(Nature of case State fully)

No case will be set for trial as a short cause matter unless ALL PARTIES join in estimate of trial time of 5 hours (1 day) or less. (silence will be deemed as joining).

2. Time estimate for trial:.... hrs ..10. days. (Caveat: No jury trial may be estimated for less than 2 days.)

3. Does any party allege that any plaintif in this action has or claims to have any of the following injuries or damages alleged to be caused or affected by the tortious conduct alleged herein ? __Yes x No

If Yes, check as applicable:

__ Amputation __ Skull Fracture

__ Traumatic Epilepsy __ Major Burns

__ Paralysis __ Multiple Fractures

__ Spinal Cord Injuries __ Loss of entire sight in one or both eyes

__ wrongful death __ Cancer

__ Major Brain Injuries

__ Waives damages over $ 25,000.00 and elect(s) arbitration per CCP 1141.11.

4a. __ Plaintiff(s)/ Parties __stipulate to arbitration per CCP 1141.11. (attach stipulation).

___ decline(s) to oppose an order to arbitration per CCP 1141.11.

b. _x_ exemption from mandatory arbitration per Rule 1600.5 California Rules of Court is claimed for the following reasons (specify):

Damages sought exceed $25,000.00

1600.5 (a) 1600.5 (h)

5a. Briefly state the nature of the case, including the nature and extent of any injuries not covered in item 3 above

and justification for any estimate over 15 days: Action for several causes of action, for breach of written contract, fraud & misrepresentation and malpractice against a law firm seeking damages

b. Damages sought: General $ 1,000,000.00

Special

c. Other relief sought:

Punitive damages of $ 3,000,000.00

6. Case entitled to preference:

___ yes _x_ No code section

7. Pretrial requested:

___Yes ___ No No pretrial where the estimate is 5 hours (1 day) or less.

8. All attorneys of record or parties appearing in person are listed below: (Indicate whether attorney for plaintiff or defendant)

SHERMAN S. WEBER 44680

Trial Attorney State Bar Number

7407 Agnew Ave, L.A. 90045

(213) 670-5931 X Request Jury

Plaintiff

TIMOTHY DOAHUE

BAKER, SILBERBERG

& KEENER

Trial Attorney State Bar

Number

2850 Ocean Park Blvd.

Santa Monica

90405 (213) 399-0900

Address Telephone

AT-ISSUE MEMORANDUM

(PLEASE FILL IN ADDITIONAL INFORMATION

ON REVERSE SIDE)

MISCELLANEOUS RECEIPT

COUNTY CLERK/EXECUTIVE OFFICER

Los Angeles County

CALIFORNIA

M 946897

CASE NO. WEC 103902 DATE _____

SUPERIOR COURT DEPT

(CUSTOMER'S RECEIPT)

RECEIVED FROM

MARCUS CAZARES

PLAINTIFF

2115½ Laverna Ave

EAGLE ROCK, 90041

INDICATE WHICH-EVER APPLIES

___ ATTY FOR

___PLTF

___DEFT

$ 137.00

One Hundred Thirty seven **dollars**

for JURY FEE DEPOSIT

CASH __ CHECK _x_ MAIL #____

MARCUS CAZARES PLAINTIFF

ELSESSER & RADER ET AL DEFENDANTS

_____

DEPUTY

CALIFORNIA CONSTITUTION ARTICLE 1

§ 16 Jury Trial; three-fourths verdict; waiver of jury trial; number of jurors

Sec. 16 Trial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict. A jury may be waived in a crimminal cause by the consent of both parties expressed in open court by the defendant and the defendant's counsel. In a civil cause a jury may be waived by the consent of the parties expressed as prescribed by statute.

In civil causes the jury shall consist of 12 persons or a lesser number agreed on by the parties in open court. In civil causes in municipal or justice court the Legislature may provide that the jury shall consist of eight persons or a lesser number agreed on by the parties in open court.

In criminal actions in which a felony is charged, the jury shall consist of 12 persons. In criminal actions in which a misdemeanor is charged, the jury shall consist of 12 persons or a lesser number agreed on by the parties in open court.

CALIFORNIA CONSTITUTION ARTICLE 6

§ 4½. Reversal for error resulting in miscarriage of justice.

Sec. 4½. No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.